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XIMPLEWARE CORP.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

XimpleWare Corp., a California Corporation,

Plaintiff;

V.

Versata Software, Inc., f/k/a Trilogy Software, Inc., a Delaware corporation; **Trilogy Development Group, Inc.**, a California corporation; **Ameriprise Financial, Inc.**, a Delaware corporation; **Ameriprise Financial Services, Inc.**, a Delaware corporation; **Aurea Software, Inc., a/k/a Aurea, Inc.**, a Delaware corporation; **Pacific Life Insurance Company**, a Nebraska corporation; **United HealthCare Services, Inc.**, a Minnesota corporation; **Metropolitan Life Insurance Company**, a New York corporation; **The Prudential Insurance Company of America**, a New Jersey corporation; **Wellmark, Inc.**, an Iowa corporation; **Waddell & Reed Financial, Inc.**, a Delaware corporation; and **Aviva USA Corporation**, an Iowa corporation.

Defendants.

Case No. 5:13-cv-5161-PSG

**PLAINTIFF XIMPLEWARE'S
CONSOLIDATED OPPOSITION TO
THREE MOTIONS TO DISMISS BY THE
VERSATA DEFENDANTS, UNITED
HEALTHCARE, AND OTHER CUSTOMERS**

Date: March 14, 2014
Time: 9:00 a.m.
Location: Courtroom 10, 19th Floor
Judge: Hon. Susan Illston

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1 INTRODUCTION

2 Despite its apparent procedural complexity, the story behind this case is simple. Versata
3 and its affiliates develop specialized enterprise software called DCM and sell it to financial
4 services and insurance companies to help them run their businesses. Versata incorporated
5 XimpleWare's VTD-XML software into DCM. XimpleWare's software is licensed as open
6 source under a license called the General Public License, or GPL. Under the GPL, software is
7 free for some purposes, but that freedom comes with strings attached. Versata violated the GPL
8 by (among other things) incorporating XimpleWare's software into DCM without proper
9 attribution, without including source code, and without entering into a commercial license with
10 XimpleWare. Because of the way in which Versata breached the GPL, its license to
11 XimpleWare's software, copyrights, and patents terminated automatically, and also made it
12 impossible for the Customers themselves to comply. XimpleWare sued Versata, its affiliates, and
13 its Customers for copyright infringement (in a separate copyright case now pending before Judge
14 Illston, no. 3:13-cv-5160-SI (the "Copyright Case") and for patent infringement (this case).

15 Before this Court are four Motions to Dismiss: one from Defendants Versata, Trilogy, and
16 Aurea (the "Versata Defendants"), Dkt. 39; a second from Defendants Pacific Life Insurance,
17 Metropolitan Life Insurance, Prudential Insurance, Wellmark, and Aviva, Dkt. 38; a third from
18 United Healthcare Services, Dkt. 33 ("UHC", and with the others, collectively the "Customers");
19 and a fourth renewed motion to dismiss from Ameriprise, Dkt. 25. XimpleWare offers this
20 consolidated Opposition in response to the three Motions by the Versata Defendants and the
21 Customers, and has already filed a separate opposition to Ameriprise's renewed motion to
22 dismiss, Dkt. 28.

23 The Court, through Judge Illston in XimpleWare's case for copyright infringement, has
24 already ruled on many of the same issues presented in these Motions. *XimpleWare v. Versata*, no.
25 3:13-cv-5160-SI, at Dkt. 61 (Feb. 4, 2014 order denying Ameriprise's motion to dismiss) (the
26 "Copyright Order", a copy of which is attached as Exhibit 1 to this Opposition for convenience).
27
28

Because XimpleWare has sufficiently pled all of its claims against all of the defendants in this case, the Court should deny all of the Motions and allow this case to proceed on its merits.

STATEMENT OF FACTS

4 1. Plaintiff XimpleWare Corp. (“XimpleWare”) had spent over a decade developing
5 and fine-tuning its copyrighted¹ software product, known as “VTD-XML” or “VTD XML
6 Extended” (collectively, the “Product”), which reads and parses XML code at a range estimated
7 to be five to ten times faster than other current XML parsing programs, effecting greater
8 efficiency and speed. Amended Complaint (Dkt. 18) (“Am. Compl.”), ¶ 42.

9 2. The Product provides indexing and incremental capabilities that are crucial to
10 many high performance XML applications and are not available in any other XML parsing
11 libraries. Efficiency and speed are critical in many applications of XML, especially in large scale
12 enterprise data interchange applications where entire server computers are dedicated to handling
13 streams of XML data. If XML data can be processed faster, then fewer servers are needed, less
14 leased space in data centers is needed for those servers, and less energy is required to power
15 those servers—altogether greatly reducing computing needs and costs. Am. Compl. ¶ 42.

16 3. XimpleWare made the business decision to license its Product and related source
17 code under an “open source” license known as the GNU General Public License version 2
18 (“GPL”). The GPL requires, among other things, that: (1) any changes made to the code carry
19 notices stating that the files were changed, and the dates of all changes; (2) any code created or
20 derived from GPL-protected code must also be licensed under the GPL; (3) copyright notices
21 must print or display when the code is run; and (4) when distributed, the program must be
22 accompanied by the complete machine-readable source code. Am. Compl., Ex. 1. All four
23 conditions must be met. Am. Compl. ¶ 34.

24 4. The GPL requires strict compliance: Under its Section 4, any failure to comply
25 with **any** of the GPL's multiple conditions means there is no license and this means any use,

²⁷ ²⁸ ¹ There is no dispute that the Copyright Office issued Registration Certificate No. TX 7-727-556 to Plaintiff XimpleWare. The Court may, of course, take judicial notice of Exhibit 2 hereto.

1 distribution, or other exploitation is not licensed, and all rights the violator could have obtained
2 under the GPL are voided. Am. Compl. ¶¶ 30–39.

3 5. XimpleWare chose the GPL approach because it is one of the most restrictive
4 licenses available, requiring that any derivative code incorporating GPL-protected code must be
5 returned to the open source community in its entirety. In other words, if Developer A creates
6 Product A and licenses it under the GPL, and Developer B creates Product B which incorporates
7 Product A, then Developer B must also license Product B under the GPL. Am. Compl. ¶ 36.

8 6. XimpleWare is the owner of all right, title, and interest in all patents related to the
9 Product and related source code, including but not limited to U.S. Patent Nos. 7,133,857,
10 7620,652, and 7,761,459. Am. Compl. ¶¶ 50–51.

11 7. All versions of the Source Code have appropriate copyright notices printed or
12 affixed conspicuously on the first page of each work, as required by the GPL. XimpleWare uses
13 the GPL-required copyright notices on its Product and its documentation to give actual and
14 constructive notice of the existence of XimpleWare copyrights. Am. Compl. ¶¶ 44–47.

15 8. The first patent (the ‘857 Patent), filed in 2002 and issued in 2006, is titled
16 “Processing Structured Data,” and contains 43 claims (including 7 independent claims) covering
17 methods, apparatuses, and program storage devices for “efficiently processing a structured data
18 file” or “efficiently processing structured data”—including XML. The ‘857 Patent has been cited
19 by five other issued U.S. patents—including patents issued to IBM, HP, and Canon—and by
20 three published U.S. patent applications. Am. Compl. ¶ 52.

21 9. The ‘652 Patent, filed in 2006 and issued in 2009, contains 35 claims (including 8
22 independent claims) for methods, apparatuses, and program storage devices, and focuses on
23 efficiently processing structured data like XML. The ‘652 Patent has been cited by two issued
24 U.S. patents by IBM and Canon and by one published U.S. patent application. Am. Compl. ¶ 53.
25 The ‘459 Patent, filed in 2006 and issued in 2010, contains 24 claims (including 4 independent
26 claims) for methods, apparatuses, hardware devices, and program storage devices, and again

1 focuses on efficiently processing structured data like XML. The '459 Patent has been cited by
 2 two issued U.S. patents and one published U.S. patent application. Am. Comp. ¶ 54.

3 10. The XimpleWare Source Code and Product practice the XimpleWare Patents and
 4 XimpleWare owns and owned the three XimpleWare Patents throughout the period of the
 5 Defendants' infringing acts. XimpleWare uses the patent numbers on its Product and in its
 6 documentation. Am. Compl. ¶ 57.

7 11. XimpleWare's SourceForge project page also clearly indicates that the VTD-
 8 XML software is licensed under the GPL; the XimpleWare web site has always made clear that
 9 any and all commercial projects, and those involving any distribution, require a commercial
 10 license under the commercial terms and conditions to be concluded with XimpleWare, and that
 11 generally requires a signed written agreement between the parties and payment of commercial
 12 royalties to XimpleWare. Multiple other commercial parties who could not come within the
 13 GPL's strict conditions have agreed to sign and have signed commercial licenses with
 14 XimpleWare and the custom and practice in the industry is for the proposed licensee to do
 15 appropriate due diligence and to assure that his, her or its project is strictly within the GPL's
 16 conditions or else to contact XimpleWare to discuss the requirements for commercial licensing.
 17 Am. Compl. ¶ 58.

The Texas Litigation

18 12. In the Summer of 2013, XimpleWare first learned of a Texas lawsuit between
 19 Defendants Versata and Ameriprise over a contract dispute (the "Texas Litigation"). According to
 20 documents filed in the Texas Litigation, Versata licensed its DCM software to Ameriprise until
 21 Ameriprise attempted to write its own software using programmers in India to replace the
 22 Versata product. Versata then sued for misappropriation, among other claims. During the
 23 prosecution of the Texas Litigation, Ameriprise informed XimpleWare that it had discovered
 24 XimpleWare's Source Code in Versata's DCM product, and with said XimpleWare Source code,
 25 none of the conditions of the GPL license had been met. There was also no evidence of any
 26
 27
 28

1 commercial license from XimpleWare and no reproduction of XimpleWare's copyright notice in
2 Versata's DCM product. Am. Compl. ¶¶ 59–61.

3 13. According to the same set of documents, Versata maintained in the course of
4 business a list of open source software components that it included in its DCM Product, and that
5 list included VTD-XML. Versata then distributed its DCM product to customers, including
6 Ameriprise, in violation of the GPL and XimpleWare's copyrights and patents. XimpleWare has
7 never granted Defendants any commercial license, permission, or authorization to use and
8 redistribute any XimpleWare Product or Source Code. The only license that the Versata
9 Defendants purported to have was from the GPL. Am. Compl. ¶¶ 66–67.

LEGAL STANDARD

11 Though the Rule 12(b)(6) test has been revised in recent years, the Supreme Court in *Bell*
12 *Atlantic Corporation v. Twombly*, 55 U.S. 544 (2007), clarified that “once a claim has been stated
13 adequately, it may be supported by showing **any** set of facts consistent with the allegations in the
14 complaint.” *Id.* at 563 (emphasis added). Thus, when deciding a motion to dismiss, Federal
15 Courts must accept “all factual allegations in the complaint as true and constru[e] them in the
16 light most favorable to the nonmoving party.” *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d
17 1005, 1014 (9th Cir. 2012); *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1058 (9th Cir. 2012);
18 *see also Guillen v. Bank of America Corp.*, 2011 WL 4071996 (N.D. Cal. 2011).

19 “To survive a motion to dismiss a complaint must contain sufficient factual matter,
20 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Lacey v. Maricopa
21 County*, 693 F.3d 896, 911 (9th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 566 U.S. 662 (2009)). A
22 complaint meets this standard when “plaintiff pleads factual content that allows the court to draw
23 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Dismissal
24 under Rule 12(b)(6) is appropriate **only** where the complaint lacks a cognizable legal theory or
25 sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*,
26 521 F.3d 1097, 1104 (9th Cir. 2008) (emphasis added).

ARGUMENT

Plaintiff opposes the Versata Defendants' and the Customers' Motions to Dismiss on the merits. XimpleWare has adequately pled the Versata Defendants' violation of the GPL, its resulting automatic termination, the impossibility of the Customers themselves acting in compliance with the GPL and the resulting automatic termination of their downstream licenses, the practicing of XimpleWare's patents by its own software, and the inclusion of that software in the Versata Defendants' DCM software, which all defendants have made, used, offered to sell, or sold. XimpleWare has thus stated claims for direct patent infringement, inducement, and declaratory relief, and the Court should deny all of the Motions to Dismiss in their entirety.

I. THE COURT HAS ALREADY RULED ON THE SUBSTANCE OF THIS MOTION.

A. The Court Has Already Held Plaintiff's Copyright Claims Sufficient.

The Court, through Judge Illston, has already held that XimpleWare's claims in its copyright case for direct copyright infringement are legally sufficient to survive a motion to dismiss. Specifically, the Court held:

Accepting as true the facts alleged in the amended complaint and drawing all reasonable inferences in favor of XimpleWare, as it must, the Court finds that XimpleWare has alleged Ameriprise reproduced and distributed the software outside of Ameriprise and to non-employees, thereby acting outside the scope of the GPL. **XimpleWare has therefore stated a claim of copyright infringement.** The Court DENIES defendants' motion to dismiss plaintiff's copyright claim.

Copyright Order at p. 5:3–7 (emphasis added).

In making this ruling, the Court considered many of the same arguments now advanced in the Motions in this case, and rejected them all.

B. The Court Has Also Held Many of Plaintiff's Secondary Claims Sufficient.

As quoted above, the Court has already held that XimpleWare has stated a claim for copyright infringement, and that secondary claims that depend on that copyright infringement claim may also proceed. The Court found that the secondary claims rise and fall with the core copyright infringement claim:

Ameriprise argues that XimpleWare's claims for unjust enrichment, unfair competition, and declaratory relief must all be dismissed **because they are**

1 **dependent upon XimpleWare's copyright infringement claim.** [] Having found
 2 that XimpleWare's allegations constitute a claim for copyright infringement, the
 3 Court accordingly DENIES the defendants' motion to dismiss XimpleWare's
 4 claims for unjust enrichment, unfair competition, and declaratory relief.

5 Copyright Order at p. 5:10–14 (emphasis added).

6 Here, the Court should apply this same reasoning, and should also deny the Motion as to
 7 XimpleWare's claims for inducing patent infringement and declaratory relief.

8 **II. XIMPLEWARE ALLEGES THE INTERRELATIONSHIPS BETWEEN
 9 VERSATA, TRILOGY, AND AUREA WITH SUFFICIENT PARTICULARITY.**

10 The Versata Defendants complain of "group pleading." Dkt. 39 at pp. 1–2. However,
 11 XimpleWare has alleged clearly in its Amended Complaint that Versata, Trilogy, and Aurea are
 12 closely interrelated companies, all of which have had a role in the development, marketing, and
 13 sale the infringing DCM product. It is notable that the Versata Defendants complain only in the
 14 abstract, without denying these interrelationships. The Court should see this for what it is: merely
 15 one more procedural roadblock to avoid adjudication on the merits, rather than to secure this
 16 case's "just, speedy, and inexpensive determination." FED. R. CIV. P. Rule 1; FED. R. CIV. P. Rule
 17 8(e) ("Pleadings must be construed so as to do justice").

18 The Versata Defendants also argue that XimpleWare has recited only conclusory *alter ego*
 19 allegations. This is, however, not true. XimpleWare has alleged specific facts tying the three
 20 Versata Defendants together closely. Specifically, XimpleWare alleges that Versata is a
 21 subsidiary of Trilogy, and that Aurea has merged with Trilogy and Versata:

22 Plaintiff is informed and believes, and on that basis, alleges (collectively
 23 hereinafter "on information and belief"), that at all relevant times Trilogy was and
 24 is the operating entity of, and has effective, if not actual, control over the business
 25 decisions made by its subsidiaries, Versata and Aurea.

26 Am. Compl. ¶ 16.

27 On information and belief, Trilogy acquired Defendant Versata in or about
 28 February 2006, and Trilogy is now the parent company of Versata and its
 29 subsidiaries.

30 Am. Compl. ¶ 5.

1 On information and belief, Aurea merged with Trilogy and Versata in October,
 2 2013.

3 Am. Compl. ¶ 6.

4 On information and belief, Ameriprise is a leading diversified financial services
 5 provider, providing a range of financial planning products and is a customer of
 6 Versata and Trilogy.

7 Am. Compl. ¶ 7.

8 The Amended Complaint further cites an Aurea press release confirming its merger with Versata
 9 and Trilogy. Am. Compl. at fn. 1.

10 The Versata Defendants cite *Quigley v. Verizon Wireless*, 2012 U.S. Dist. LEXIS 75027
 11 (N.D. Cal. May 30, 2012) for the proposition that bare *alter ego* allegations are insufficient to
 12 survive a motion to dismiss. However, *Quigley*, a debt collection case, is easily distinguished.
 13 There, the plaintiff sued a wireless phone carrier and debt collectors it had engaged in an arms-
 14 length transaction. The Court dismissed the claims against the debt collectors' parent companies
 15 because all the plaintiff had alleged was the mere fact of the parent-child relationship. *Id.* Here,
 16 however, XimpleWare alleges far more: that all three of the Versata Defendants actively
 17 contributed to the infringing activities at the core of this dispute. *See, e.g.*, Am. Compl. ¶¶ 5, 6, 7,
 18 9, 16. This is not merely an allegation of a parent-child relationship. It is an allegation that **all**
 19 **three companies share active business operations, and that all three companies contributed**
 20 **directly related to the infringing acts.** Thus, *Quigley* is distinguishable, as are *Mindlab Media,*
 21 *LLC. v. LWRC Int'l LLC*, CV 11-CV-3405, 2012 WL 386695 (C.D. Cal. Feb. 6, 2012) and
 22 *Automated Transaction LLC v. New York Cnty. Bank*, 12-CV-3070, 2013 WL 992423 (E.D.N.Y.
 23 Mar. 13, 2013).

24 The allegations XimpleWare makes in its Amended Complaint are more than sufficient to
 25 support claims on the basis of *alter ego*. *Maganallez v. Hilltop Lending Corp.*, 505 F. Supp. 2d
 26 594, 607–08 (N.D. Cal. 2007) (holding that allegations of inadequate capitalization and failure to
 27 maintain formalities was sufficient for *alter ego* allegations to survive motion to dismiss) *citing*
 28 *In re Napster Copyright Litig. v. Hummer Winblad Venture Partners*, 354 F. Supp. 2d 1113, 1121
 (N.D. Cal. 2005) (allegations of “essentially full operational control” sufficient to support *alter*

1 *ego* claims). Here, XimpleWare has alleged the domination and control over Versata and Aurea
 2 by Trilogy and the inequities caused if Trilogy is allowed to hide behind the corporate form it has
 3 abused. Accordingly, the motion to dismiss as to the *alter ego* claims should be denied.

4 **III. XIMPLEWARE LICENSES ITS SOFTWARE
UNDER STRICT AND SPECIFIC CONDITIONS ONLY.**

5 **A. The GPL Contains Many Restrictions on Use, Including
Notice and Attribution, as Well as Copying and Distribution.**

6 The GPL does not provide “free” software for unlimited commercial use.² Rather, it
 7 allows certain persons to use source code under very strict terms that require returning code to
 8 the open source community, and maintaining at all times (a) copyright notices, (b) disclaimers of
 9 warranties, (c) notices referencing the GPL license, and (d) when distributed, the program must
 10 be accompanied by the complete machine-readable source code. For example, the GPL states:

11 You may copy and distribute verbatim copies of the Program’s source code as you
 12 receive it, in any medium, provided that you conspicuously and appropriately
 13 publish on each copy an appropriate **copyright notice** and **disclaimer of
warranty**; keep intact all the notices that refer to this License and to the
 14 absence of any warranty; and give any other recipients of the Program a copy of
 15 this License along with the Program.

16 GPL at § 1 (emphasis added). Another very clear conditional example is expressed in section 2:

17 If the modified program normally reads commands interactively when run, you
 18 must cause it, when started running for such interactive use in the most ordinary
 19 way, [1] to print or display an announcement including an appropriate
copyright notice [2] and a notice that there is no warranty (or else, saying that
 20 you provide a warranty) and that users may redistribute the program [3] under
these conditions, and [4] telling the user how to view a copy of this License.

21 GPL at § 2(c) (emphasis and brackets added).

22 //

23 //

24 //

25

26 ² The defendants repeat this wildly inaccurate characterization of the GPL throughout their
 27 briefs. The Court need only glance at the GPL to realize that it contains many detailed terms and
 28 conditions that place real limits on how GPL-licensed software is treated. To say GPL-licensed
 software has “no restrictions” is simply untrue. Dkt. 33 at p. 5; Dkt. 38 at p. 1, 2.

1 The illegally copied and illegally distributed code did not contain the required notices and
 2 disclaimers and that can never be GPL-compliant under these provisions. The use of the words
 3 “provided that” in the license term in Section 1 of the GPL means the required notices are a
 4 condition precedent to the grant of a license, not merely a condition of it. Conditional language
 5 such as “provided” has long been upheld to create a condition precedent. *Schwab v. Bridge*, 27
 6 Cal. App. 204 (1915); *see also Matthews v. Starritt*, 252 Cal. App. 2d 884, 887 (1967) (“‘Subject
 7 to’ means subordinate to [citations] and is generally interpreted as a condition precedent.”
 8 [citations omitted]).

9 There can be no doubt that the Versata Defendants failed to comply with these conditions
 10 precedent to a license under the GPL because they either removed or never included: (a)
 11 XimpleWare’s copyright notices, (b) the GPL warranty disclaimer, (c) a full copy of the modified
 12 code, or (d) the notice of the GPL license itself as alleged in the Amended Complaint. Am.
 13 Compl. ¶ 34, 61, 71. Any one of these failures is fatal. GPL § 1. The software that the Versata
 14 Defendants provided to Ameriprise and other customers did not contain the requisite notices and
 15 disclaimers. Am. Compl. ¶ 63. For this reason alone, XimpleWare has more than adequately pled
 16 and established that the Versata Defendants have violated the GPL, and no license was ever
 17 granted—which means that no use by any defendant was ever authorized, licensed or otherwise
 18 compliant with the GPL.

19 **Defendant Ameriprise agrees**, stating that “the rights to copy, modify, sublicense, and
 20 distribute the software are all contingent on precise compliance with the terms of the GPL, and
 21 are terminated in the event of non-compliance.” Dkt. 25 at p. 7:20–22. However, again, the Court
 22 has already ruled on this issue in the context of Ameriprise’s motion to dismiss in the Copyright
 23 Case, holding that XimpleWare’s allegations against Ameriprise were sufficient to withstand a
 24 Motion to Dismiss. Copyright Order at p. 5. The same is equally true in this case.

25 **B. The GPL’s Preamble is Factual and Not Part of the Legally**
 26 **Binding Terms and Conditions of the Limited License Grant Language.**

27 The GPL’s lengthy “Preamble” section is not a legally operative part of the GPL; it is
 28 generally understood in the open source community to be simply recitals. The Preamble’s own

1 terms make it clear that the operative language is in the subsequent sections, stating in its last
 2 sentence, "The precise terms and conditions for copying, distribution and modification follow."
 3 This is further confirmed in the secondary literature where, for example, Lawrence Rosen, an
 4 attorney and noted open source expert, states in a 2004 book:

5 The preamble, of course, is **not** an operative part of the GPL license. It is not
 6 among its *terms and conditions*. There is nothing in its words that must be
 7 obeyed. It is merely a helpful preface so that you can better understand the GPL in
 8 its context.

9 LAWRENCE ROSEN, OPEN SOURCE LICENSING: SOFTWARE FREEDOM AND INTELLECTUAL
 10 PROPERTY LAW 109 (Prentice Hall 2004) (emphasis added).

11 As this is a Motion to Dismiss, the allegations in the Amended Complaint must be taken
 12 at full face value. While the Court may consider certain types of contracts attached to pleadings,
 13 non-binding language such as the Preamble cannot override the clear allegations of the
 14 Complaint, let alone the actual terms and conditions of the GPL. Those terms and conditions—
 15 whose breach and non-compliance by all defendants is clearly alleged—control and are fully
 16 governing here. Accordingly, the Motions to Dismiss must be denied.

17 **IV. XIMPLEWARE'S AMENDED COMPLAINT
 18 PROPERLY ALLEGES THAT THE VERSATA DEFENDANTS
 19 VIOLATED THE GPL AND INFRINGED XIMPLEWARE'S PATENTS.**

20 **A. The Facts of The Versata Defendants' Infringing Conduct Are Clearly Pled.**

21 As alleged in XimpleWare's Amended Complaint, XimpleWare provided its software
 22 online under the GPL. Versata downloaded XimpleWare's software, and included a subset of it—
 23 object code only, without any notices, without any warranty disclaimers, without a copy of the
 24 code, and without any license information—in its DCM product, which it distributed to
 25 customers including Ameriprise and the other Customers. Am. Compl. ¶¶ 68-69. **XimpleWare**
 26 **has alleged that the software Versata distributed was not GPL compliant—including**
 27 **especially its failure to include the required notices and disclaimers.** Am. Compl. ¶¶ 34, 61,
 28 71.

1 **B. The Versata Defendants' GPL Violation, Breach of Contract,
And Patent Infringement are Pled Clearly and Sufficiently.**

2 **1. The GPL Implements Automatic Voiding of a Failed License Grant.**

3 At all times, the Versata Defendants were strictly bound by the GPL's terms and
4 conditions. There is no dispute that the GPL applies to the Versata Defendants: their arguments
5 are all attempts to reinterpret the GPL, not claim its inapplicability.

6 Section 4 of the GPL states a requirement of strict compliance, and any violation
7 terminates the license automatically at the moment of violation. Section 4's language is clear on
8 this:

9 **4. You may not copy, modify, sublicense, or distribute the Program except as
10 expressly provided under this License.** Any attempt otherwise to copy, modify,
11 sublicense or distribute the Program is void, and **will automatically terminate
your rights under this License.** However, parties who have received copies, or
rights, from you under this License will not have their licenses terminated so long
as such parties remain in full compliance.

12 GPL at § 4 (emphasis added).

13 The Court, in the Copyright Case, has already held that if a party violates the GPL, then
14 an action for copyright infringement is appropriate. Copyright Order at pp. 4–5, *citing Jacobsen*
15 *v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008) (allowing action for copyright infringement based on
16 breach of open source license). This is equally true in the patent context. *Mass. Inst. of Tech. v.
17 Abacus Software, Inc.*, 2004 U.S. Dist. LEXIS 30052, 2004 WL 5268123 (E.D.Tex. Aug. 4,
18 2004) (“A patent license grants the licensee rights to undertake activities that would otherwise
19 constitute infringement, *i.e.*, to produce and sell products covered by a patent. If a licensee
20 materially breaches the license, however, the licensee loses the protection of the license and
21 becomes a mere infringer.”).

22 The Amended Complaint alleges clear facts amounting to a breach which triggers this
23 automatic termination, and such allegations must be accepted as true for these Motions—and the
24 Court must fairly apply the law and reach the obvious results, namely that any and all licenses
25 terminated automatically under these provisions. Am. Compl. ¶¶ 39, 67.

26 XimpleWare's Amended Complaint states multiple instances of violations of the terms of
27 the GPL. First, the Versata Defendants made copies of XimpleWare's software without the
28

1 required copyright notices and license information. Second, the Versata Defendants made illegal
 2 “distributions” within the meaning of the GPL as well as copyright law and patent law (because
 3 “distribution” is a kind of either “use” or “sale” under 35 U.S.C. § 271(a)). Third, the adoption
 4 into commercial software is also not authorized and violates XimpleWare’s patent rights (again,
 5 either “use” or “sale” under 35 U.S.C. § 271(a)). The effect of any and each violation is that the
 6 Versata Defendants breached the GPL and lost any license automatically, at that moment, by
 7 operation of law, and they are therefore patent infringers.

8 **2. The Versata Defendants Violated the
 9 GPL By Either Removing or Failing to Include
 10 Both XimpleWare’s Copyright Notices and the GPL License Itself.**

11 XimpleWare’s Amended Complaint states that Versata’s DCM software, which
 12 incorporates XimpleWare’s software, does not include any XimpleWare copyright or use notices.
 13 Am. Compl. ¶¶ 61, 70 XimpleWare alleges that it has always included such copyright notices on
 14 its source code and in the software packages it distributes online via SourceForge. Am. Compl. ¶
 15 87.

16 Under the GPL, Section 1 is incorporated by Section 3, which governs distribution and
 17 copying of GPL-licensed software in object code form: “You may copy and distribute the
 18 Program (or a work based on it, under Section 2) in object code or executable form under the
 19 terms of Sections 1 and 2 above provided that you also do one of the following...” GPL § 3.

20 XimpleWare’s Amended Complaint alleges clearly that Versata downloaded
 21 XimpleWare’s software (Am. Compl. ¶¶ 61–62); included it in object code form in its DCM
 22 product (Am. Compl. ¶¶ 61–73); and did not include any XimpleWare copyright notices or GPL
 23 licensing information (Am. Compl. ¶¶ 59–73). For these reasons, XimpleWare’s claims are well-
 24 founded and this Motion must be denied.

25 Finally, XimpleWare alleges that this distribution³ ran afoul of the terms and conditions
 26 of the GPL, and thus the Versata Defendants’ patent license under the GPL terminated

27 ³ The Patent Act does not define “use” or “distribution.” However, “[t]he few court decisions that
 28 address the meaning of ‘use’ have consistently followed the Supreme Court’s lead in giving the

1 automatically. Am. Compl. ¶ 67 XimpleWare pled adequate facts in support of each of these
 2 allegations, as the Court has already found. Copyright Order at p. 5 (order denying Ameriprise
 3 motion to dismiss).

4 Thus, XimpleWare has sufficiently pled that the Versata Defendants do not have a license
 5 to XimpleWare's software.

6 **V. ALL DEFENDANTS PRACTICE THE XIMPLEWARE PATENTS IN SUIT.**

7 The final element of XimpleWare's direct patent infringement claim is that the defendants
 8 practice the patents in suit. This alleged clearly in the Amended Complaint, despite attempts to
 9 obfuscate it. XimpleWare alleges that:

- 10 1. its VTD-XML software practices the three patents in suit (¶¶ 56, 80);
 11 2. the Versata Defendants included VTD-XML software in their DCM software
 12 (¶ 82)
 13 3. the Versata Defendants made (by making copies), used (by using it internally and
 14 selling it), offered to sell, and did sell copies of DCM including VTD-XML
 15 (¶¶ 61–68, 83);
 16 4. the Customers received those copies of DCM including VTD-XML (¶¶ 68, 84);
 17 and
 18 5. the Customers made (by making more copies, including to third parties) and used
 19 that software (¶¶ 68, 70, 73, 81, 84–85).

23 term a broad interpretation.” 5-16 CHISUM ON PATENTS § 16.02, citing *NTP, Inc. v. Research in
 24 Motion, Ltd.*, 418 F.3d 1316–17 (Fed. Cir. 2005). Although one might also expect to look to
 25 copyright law for help interpreting the GPL, which is both a copyright license and a patent
 26 license, the Federal Copyright Act does not itself define “distribution” either. 17 U.S.C. § 106; 4
 27 PATRY ON COPYRIGHT § 13:9 (2013). A common sense approach to statutory interpretation is
 28 therefore warranted. The word “distribution” generally includes “the exclusive right to sell or
 otherwise transfer ownership of, rent, lease, or lend one or more copies or sound recordings of
 the work.” 2-8 NIMMER ON COPYRIGHT § 8.11[B][1] (2014); *see also* 17 U.S.C. § 106(3).

1 **VI. XIMPLEWARE'S OTHER CLAIMS SURVIVE BECAUSE IT HAS
ALLEGED AND WILL PROVE THE ELEMENTS OF ITS WELL-PLED PATENT CLAIM.**

2 The elements for stating a claim for direct patent infringement are laid out clearly in the
3 Patent Act:

4 Except as otherwise provided in this title, whoever without authority makes, uses,
5 offers to sell, or sells any patented invention, within the United States or imports
6 into the United States any patented invention during the term of the patent
therefor, infringes the patent.

7 35 U.S.C. § 271(a) (2014).

8 **A. XimpleWare Owns the Patents in Suit
and the Unlicensed VTD-XML Software.**

9 There is no dispute in this case that XimpleWare is the owner of the patents in suit (Am.
10 Compl. ¶ 57), as well as the source code to VTD-XML that implements them—the use of
11 unlicensed copies of which XimpleWare contends constitutes patent infringement. Indeed, there
12 can be no dispute—especially at the pleadings stage—because XimpleWare presents a copyright
13 registration and three issued patents, which all constitute *prima facie* evidence of ownership.
14 *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989)
15 (“copyright registration is *prima facie* evidence of ownership”); 35 U.S.C. § 282 (patent
16 presumed valid) .

17 XimpleWare’s Amended Complaint alleges clearly that multiple parties (including
18 Ameriprise) received XimpleWare’s software from Versata, and that Versata violated the GPL.
19 *See generally*, Amended Complaint. The Copyright Office Registered Plaintiff’s Copyright and
20 Issued Registration Certificate TX 7-727-556 to Plaintiff, affording XimpleWare all the rights
21 connected thereto, and the U.S. Patent and Trademark Office issued three patents to
22 XimpleWare. Am. Compl. ¶¶ 50–54

23 **B. No Defendant Had Authority to Practice XimpleWare’s Patents.**

24 As discussed in detail above, no defendant has had authority to practice XimpleWare’s
25 patents because of the Versata Defendants’ violation of the GPL, and impossibility that the
26 Customers could ever comply based on the nature of the Versata Defendants’ own infringement,
27 which rendered their downstream receipt of the GPL void *ab initio*.

1 C. **XimpleWare Alleges That The Defendants “make[], use[],
offer[] to sell, or sell[]” Software Implementing the Patents.**

2 XimpleWare has clearly alleged that all of the Defendants infringe the patents-in-suit.

3 The Versata Defendants have used, offered to sell, and sold software incorporating XimpleWare’s
4 VTD-XML software which practices the patents. Am. Compl. ¶ 73. Ameriprise has also used the
5 software both for its internal purposes and with its outside third-party franchisees. Am. Compl.
6 ¶¶ 68–69.¶; Copyright Order at p. 5. The other Customers have similarly used the software. Am.
7 Compl. ¶ 84. These acts all qualify as direct infringement. Finally, XimpleWare has alleged no
8 activity beyond the United States.

9 **VII. XIMPLEWARE PROPERLY PLEADS INDUCEMENT OF PATENT INFRINGEMENT.**

10 The key to XimpleWare’s patent inducement claim is simple: the Versata Defendants
11 have not given their customers notice or means to comply with the GPL. Any customer’s use of
12 the infringing DCM software is doomed to violate the GPL, the consequence of which is
13 automatic termination of the customer’s GPL license. Thus, all the Customers never had licenses
14 to begin with, because no conditions for a license grant were ever met—or, to put it differently,
15 any purported licenses were void *ab initio* and/or were instantly terminated automatically as a
16 direct result of the Versata Defendants’ infringing conduct and failure to tell their Customers that
17 its DCM product included XimpleWare’s VTD-XML. This is classic inducement of patent
18 infringement, for which all Defendants are strictly liable under well-settled patent law principles.
19 5-17 CHISUM ON PATENTS § 17.04 (2014).).

20 A. **Like Versata’s, the Customers’ Licenses Also
Terminate Automatically Upon Their Own Violation of the GPL.**

21 The parties agree that, under the terms of the GPL, one party’s distribution of GPL-
22 licensed software confers a license under the GPL to the receiving party. GPL § 6. However, the
23 **receiving party is equally bound by the GPL’s terms and conditions**, including the conditions
24 that XimpleWare clearly alleges that the Versata Defendants violated—as well as its automatic
25 termination provision. If the receiving party violates any term or condition, its license
26 **terminates automatically** and, where there was never any compliance, the license is void *ab*

1 *initio*. Section 4 of the GPL—which Defendant United Healthcare quotes in its motion, Dkt. 33,
 2 at pp. 5–6, and which the other Customers quote at pp. 4–5 of their motion, Dkt. 38—states:

3 You may not copy, modify, sublicense, or distribute the Program except as
 4 expressly provided under this License. Any attempt otherwise to copy, modify,
 5 sublicense or distribute the Program is void, and will **automatically terminate**
 6 your rights under this License. However, parties who have received copies, or
 7 rights, from you under this License will not have their licenses terminated **so long**
as such parties remain in full compliance.

8 GPL § 4 (emphasis added).

9 **B. It is Factually Impossible for the**
 10 **Versata Defendants' Customers Not to Violate the GPL.**

11 Under the facts alleged in the Amended Complaint, it is **impossible** for the Versata
 12 Defendants' customers not to violate the GPL and infringe on XimpleWare's patents.

13 XimpleWare has alleged, among other violations, that the Versata Defendants distributed
 14 VTD-XML without a copy of the GPL (a first violation); did not include a copy of its source
 15 code (a second violation); and did not offer to provide its source code (a third violation). In
 16 combination with the Versata Defendants' utter lack of notice to their customers that VTD-XML
 17 was included in DCM, there is no way that those customers even could know that they had to
 18 comply with the GPL. This is precisely the position in which Ameriprise found itself; it is
 19 precisely the point of the GPL's notice conditions; and it is precisely the interpretation of the
 20 GPL that the Court has already found sufficient for purposes of Ameriprise's motion to dismiss.
 21 Copyright Order at p. 5.

22 The Versata Defendants provided VTD-XML to their customers as a part of DCM. Am.
 23 Compl. at ¶ 84. Under Section 3 of the GPL, object code copies must be accompanied by one of
 24 the following: (1) a copy of the source code; (2) an offer to provide the source code; or (3)
 25 information the providing party received regarding an offer to provide the source code.
 26 XimpleWare alleges that the Versata Defendants provided their customers **none** of those things
 27 (as Ameriprise confirms), and thus violated the GPL.

28 Because the Versata Defendants' customers never received any of the information
 required to make a compliant copy of the object code, nor any source code, nor any notice at all
 Dismiss

1 that the GPL applied, **it is factually impossible for the Versata Defendants' customers not to**
 2 **violate the GPL.**

3 **C. The Versata Defendants' Customers Cannot Satisfy Conditions Precedent.**

4 The Versata Defendants' customers received XimpleWare's software in violation of the
 5 GPL license. For their subsequent use of the XimpleWare software to be licensed, they had to
 6 first comply with all the terms and conditions—because, like the original license itself, this
 7 “automatic” license contains a condition precedent requiring compliance with the terms and
 8 conditions of the GPL license. *Matthews v. Starritt*, 252 Cal. App. 2d 884, 887 (1967).

9 XimpleWare has alleged that the code the Versata Defendants' Customers received from Versata
 10 and that the Versata Defendants' customers used was not GPL compliant—including especially
 11 its failure to include the required notices and disclaimers. Am. Compl. ¶¶ 39, 61, 67. Because of
 12 the Customers' failure—indeed, inability—to meet this additional condition precedent to the
 13 “automatic” license, their receipt of a copy and use of XimpleWare's software was never
 14 authorized, never licensed, and at all times an infringement of XimpleWare's patents. For this
 15 additional reason, the Motions must be denied both as to the inducement claim against the
 16 Versata Defendants and as to the direct infringement claims against the Customers.

17 **D. The Versata Defendants Had Full Knowledge That They Were**
 18 **Selling Many Open Source Components, Including XimpleWare's, in DCM.**

19 XimpleWare also alleges that the Versata Defendants had clear, early knowledge that they
 20 were incorporating GPL-licensed software into their DCM product and selling it (as their own) to
 21 customers:

22 Versata's commercial distribution of the XimpleWare Product or Source Code
 23 outside the terms of the GPL was knowing and willful. According to documents
 24 filed in the Texas Litigation^[4], **Versata maintained in the course of business a**
 25 **list of open source software components that it included in its DCM product,**
 26 **and that list included VTD-XML as well as the fact that VTD-XML and**
 27 **several other components were licensed under the GPL...**

28 Am. Compl. ¶ 65 (emphasis added).

⁴ *Versata v. Ameriprise*, Travis County District Court, No. D-1-GN-12-003588, removed in January 2014 by Ameriprise to Federal court as *Versata v. Ameriprise*, U.S. District Court for the Western District of Texas, No. 1:14-cv-00012-SS.

1 This clear knowledge of VTD-XML's licensing status, coupled with the failure to even
 2 attempt to negotiate a commercial license with XimpleWare, makes the Versata Defendants liable
 3 for willful patent infringement—and it also provides a further basis for XimpleWare's claim for
 4 inducing patent infringement.

5 By encouraging their Customers to receive and make copies onto their own computers to
 6 run DCM, without giving them notice or means to comply with the GPL, the Versata Defendants
 7 have induced their Customers to infringe XimpleWare's patents. The Court should deny the
 8 Versata Defendants' Motion as to XimpleWare's inducement claim.

9 **VIII. AT MINIMUM, LEAVE TO AMEND SHOULD BE LIBERALLY GRANTED.**

10 The Ninth Circuit has held that "if a complaint is dismissed for failure to state a claim,
 11 leave to amend should be granted unless the court determines that the allegation of other facts
 12 consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber*
 13 *Distributing v. Serv-Well Furniture Co.*, 806 F.2d. 1393, 1401 (9th Cir. 1986). Even if the Court
 14 finds any reason to grant the Versata Defendants' motion to dismiss, it is well-established that the
 15 proper remedy is to permit Plaintiff to amend the claims for relief at issue. Leave to amend
 16 should **only** be denied in extreme circumstances where it would cause undue prejudice, or where
 17 it would be impossible to cure the defect with an amendment, *e.g.*, where a statute had not been
 18 enacted at the time of the alleged facts. *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149,
 19 1159 (9th Cir. 1989) (denial of leave to amend proper where sought amendment was tardy, and
 20 amendment would be futile because statute was not even enacted at time of alleged facts). Here,
 21 neither is true—no defendants have even answered XimpleWare's Complaint or Amended
 22 Complaint, so there would plainly not be manifest injustice in another amendment, and
 23 impossibility is a high bar that Defendants do not clear.

24 **CONCLUSION**

25 The Versata Defendants lost their license under the GPL automatically by breaching its
 26 terms, and thus, their making, use, sale, and offering for sale of DCM incorporating

1 XimpleWare's software is without a license and constitutes patent infringement and inducement
 2 of their Customers' infringement.

3 As the Amended Complaint alleges, the Versata Defendants used XimpleWare's software
 4 without the required notices and disclaimers, and distributed XimpleWare's code without
 5 authorization and also without the required notices. Because the XimpleWare software practices
 6 the XimpleWare patents-in-suit, and because the Versata Defendants have no license to those
 7 patents, the Versata Defendants have infringed XimpleWare's patents. Moreover, the Versata
 8 Defendants made it impossible for their Customers to comply with the GPL, and thus induced
 9 them to infringe, which they did. XimpleWare's Amended Complaint pleads all the facts
 10 necessary to support these conclusions, and all four Motions to Dismiss should be denied in their
 11 entirety.

12 Because a motion to dismiss may only be granted when no set of facts would support the
 13 alleged claims, Plaintiff respectfully requests an opportunity to amend its complaint to allege
 14 additional facts if the Court determines that further factual allegations are required to state any
 15 claim for relief. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave freely given). Thus, even if the
 16 any claims are not sufficiently pled, the Court should grant XimpleWare leave to amend.

17
 18 Respectfully submitted,

19 Dated: February 10, 2014
 20 By: /Jack Russo/
 21 Jack Russo
 Christopher Sargent
 Ansel Halliburton
 22 Attorneys for Plaintiff
 23 XIMPLEWARE CORP.
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 26
 27
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